In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1257

LINDBERGH KIRBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the Court of Claims dismissing his suit for retirement pay as time-barred.

1. Petitioner served continuous enlistments in the United States Army and Air Force from June 30, 1946, to May 2, 1963, when he received an honorable discharge for unsuitability. Petitioner was credited with 16 years, 6 months, and 23 days of satisfactory service for entitlement to retired pay. At the time of his discharge, petitioner was serving a six-year enlistment that would have expired July 10, 1967, and, had he served the full term of his last enlistment, petitioner would have been eligible for retirement with more than 20 years of active service pursuant to 10 U.S.C. 8914 (Pet. App. 15).

After an unsuccessful application in 1967-1968 to the Air Force Board for Correction of Military Records, petitioner filed this suit in the Court of Claims on September 16, 1971, claiming that he was "wrongfully, illegally and unlawfully administratively discharged" and seeking to recover active duty pay and allowances from the date of his discharge to the expiration of his enlistment term[1] as well as retired pay and allowances. The Court of Claims held that when entitlement to retirement benefits depends on invalidating an allegedly illegal discharge, suit must be brought within six years of the date of discharge; accordingly the court dismissed the petition, filed more than eight years after discharge, as barred by the statute of limitations (Pet. App. 15-31).

2. The decision of the Court of Claims is correct and further review is not warranted. The issue in this case is identical to that in *Rynerson* v. *United States,* No. 73-1084, certiorari denied, March 25, 1974. The same considerations which prompted the Court to deny the petition in No. 73-1084 are equally applicable here. See also, *Hames* v. *United States,* 164 Ct. Cl. 746, certiorari denied, 377 U.S. 904; *Palmer* v. *United States,* 121 F. Supp. 643 (Ct. Cl.)

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[1]Petitioner has abandoned his claim for active duty pay and allowances.